IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 87.

ORSEL McGHEE and MINNIE S. McGHEE, his wife,

Petitioners,

vs.

BENJAMIN J. SIPES, and ANNA C. SIPES, JAMES A. COON and ADDIE A. COON, *et al.*,

Respondents.

BRIEF OF CALIFORNIA AMICI CURIAE.

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BRIEF OF CALIFORNIA AMICI CURIAE.

Preliminary Statement.

Amici curiae represent a client in pending litigation who has an interest in the decision and judgment of this court upon the issues presented by this case.[1] Consent of counsel for petitioners and respondent has been obtained, and permission is respectfully requested for leave to file this brief, and to have the same considered in this and companion cases before the court.

[1] *Tolhurst v. Venerable and Crawford*, Supreme Ct. of Calif., L. A. No. 19759, pending and submitted before the Supreme Court of California, on appeal from judgment for defendants by the Superior Court of Los Angeles County.

This brief will be limited to presenting certain legal aspects of the problem resulting from the prevalent use of private covenants restricting the use and occupancy of real property to persons of the white race. The law questions involved will be fully and adequately presented by the briefs of petitioners and other interested parties. There will be considered herein only the following:

1. The amount of litigation involved in the enforcement of racial restrictive covenants in the County of Los Angeles.

2. Cases now pending in the Supreme Court of the State of California.

3. Character of the proscriptions.

4. Current trends.

5. Recent judicial expression at the trial court level.

Amount of Litigation.

In excess of 70 individual actions involving over 160 parcels of land have been filed in Los Angeles County since 1943. The great majority of the actions involve Negroes. In view of the judicial attitude in regards to the enforcement of racial restrictive covenants[2] this vast amount of litigation is indicative of the tremendous pressures incident to the problems of housing for members of the Negro race in Los Angeles County.

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[2] *Swift v. Rogers*, Los Angeles Superior Ct. No. 500075, wherein the trial court stated: "However, desirable the defendants may be in the cultural life of the immediate community and as neighbors, we must apply the law as it exists. Restrictions as to use or occupancy will be enforced in a court of equity."

Cases Pending Before the Supreme Court of California

There are now pending before the Supreme Court of California 22 cases directly involving the constitutionality of racial restrictive covenants.[3]

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[3] *In re Laws*, Crim. No. 4698, Petition for Writ of Habeas Corpus filed Dec. 18, 1945. Argued June 13, 1946.

Fairchild v. Raines, Supreme Ct. of Calif., L. A. No. 19523. Transcript filed Oct. 15, 1945. Set for argument June 13, 1946, argument waived.

Anderson v. Auseth; Swith v. Crawford; Maricq v. Pickett; Daniels v. Johnson; Tolhurs: v. Venerable; White v. Smith; Weber v. Twyne, Sr.; McComas v. Lott (consolidated), Supreme Court of Calif., L. A. No. 19759. Transcript filed June 6, 1946. Argued Oct. 2, 1946.

Trautman v. O'Ferral; Hester v. Barbe; Hester v. Thompson; Hester v. Morrison; McCormick v. Howard; Bushelman v. Cooper; McCormick v. McCray; Supreme Ct. of Calif., L. A. Nos. 19588, 89, 90, 91, 92, 93 and 94, numbered respectively and consecutively. Transcript filed Dec. 20, 1945. Argued June 13, 1946.

Cassell v. Hickerson, Supreme Ct. of Calif., L. A. No. 19685. Transcript filed Mar. 22, 1946. Set for argument June 13, 1946. Argument waived.

Davis v. Carter, Supreme Ct. of Calif., L. A. No. 19696; *Davis v. Williams*, Supreme Ct. of Calif., L. A. No. 19699. Transcript filed Dist. Ct. of Appeal of Calif., Apr. 2, 1946. Transferred to Supreme Ct. of Calif., April 15, 1946. Set for argument June 13, 1946. Argument waived.

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Merriweather v. Flemming; Merriweather v. Looper (consolidated), Supreme Ct. of Calif., L. A. No. 19916. Transcript filed Oct. 2, 1946.

Clayton v. Wilkins, Supreme Ct. of Calif., L. A. No. 20399. Transcript filed Oct. 28, 1947.

Character of the Proscriptions.

The restrictions are not limited to the Negro alone, although they are the chief victims. Restrictions against American Indians,[4] Japanese,[5] Chinese,[6] Koreans,[7] have been upheld. The restrictions are not limited to the lower economic brackets, but cover all sections of the minority groups from slum areas[8] through property of the middle income,[9] and including the high income groups,[10] in the Negro community.

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[4]*Swift v. Rogers,* Los Angeles Superior Ct. No. 500075. See Note 2, *supra.*

[5]*Bousek v. Kim,* Los Angeles Superior Ct. No. 521066; *Tracey v. Natsura,* Los Angeles Superior Ct. No. 527327; *Bennett v. Rozier,* Los Angeles Superior Ct. No. 528911 (involving 17 parcels of land); *Morin v. Crane,* Los Angeles Superior Ct. No. 529939 (involving 6 parcels of land).

[6]*Amer v. Superior Court of L. A. County,* Los Angeles Superior Ct. No. 512074 (*Kroeger v. Kong*). Petition for Writ of Prohibition to Supreme Court of Calif. denied Aug. 21, 1947, L. A. No. 20303. Petition for Writ of Certiorari filed in Supreme Court of U. S. Nov. 6, 1947, No. 429.

[7]*Kim v. Superior Court of L. A. County,* Los Angeles Superior Court No. 521066 (*Bousek v. Kim*). Petition for Writ of Prohibition to Supreme Court of Calif. denied Aug. 21, 1947, L. A. No. 20302. Petition for Writ of Certiorari filed in Supreme Court of U. S. Nov. 6, 1947, No. 430.

[8]*Thompson v. Clark,* District Court of Appeal of Calif., L. A. No. 15215.

[9]*Trautman v. O'Ferral; Hester v. Barbe; Hester v. Thompson; Hester v. Morrison; McCormick v. Howard; Bushelman v. Cooper; McCormick v. McCray;* Supreme Ct. of Calif., L. A. Nos. 19588, 89, 90, 91, 92, 93 and 94, numbered respectively and consecutively.

[10]*Tolhurst v. Venerable and Crawford,* and consolidated cases, Supreme Ct. of Calif., L. A. No. 19759.

Current Trends.

In an effort to restrict Negroes, Orientals and Mexicans to the few areas now occupied by them in Los Angeles County, restrictive covenant activities have increased greatly in the neighborhoods immediately surrounding those areas. Previously, this circulation of contracts containing these restrictive covenants was conducted by Property Owners' Associations and Realty Boards. The work was largely volunteer and covered only small areas at a time.

Scope and determination of the current campaign, however, is indicated by the new use of commercial enterprises specializing in this work. A meeting of the Presidents and Secretaries Council of the San Fernando (Los Angeles County) Valley Chambers of Commerce[11] has resulted in the October appearance of a public relations firm engaged in the business of "promoting" segregation, using a technique of blanketing large areas with a single expandable agreement. Property owners and realty boards are gradually privately zoning residential property in Southern California. All such activities are premised upon reliance on prospective court enforcement of these restrictive covenants and agreements. The restrictions are not limited to individual action but take on a public or quasi-public character. The City of Pasadena has inserted a race restrictive covenant in the sale of tax deeded land. The constitutionality of said action is now being tested in the trial court.[12]

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[11] *Valley Advertiser,* published by the Hollywood Citizen-News on May 22, 1947, page 1.

[12] *Chamberlain v. City of Pasadena* (Los Angeles County), Pasadena Superior Ct. No. C-2702.

Recent Judicial Expression.

In earlier cases involving enforcement of the racial covenant restrictions, and in some current cases, the trial courts felt constrained to follow literally the holding of the California Supreme Court in the *L. A. Investment Co. v. Gary* case.[13] This is one of the first cases in the United States which laid the pattern for enforcement of private racial covenant restrictions. In some instances, however, restrictions were not enforced because of equitable considerations.[14] In other cases the rule of the *L. A. Investment Co.* case holding the covenants to be not violative of the Federal Constitution has been followed. Within the recent past, however, there has been a change of view on the part of certain trial judges who have refused to enforce the restrictions on the grounds that they were unconstitutional. Their opinions are suggested to the Court, not as authoritative except as they reflect a considered moral, ethical and—what we respectfully believe to be—a sound legal position.

Los Angeles Superior Court Judge Thurmond Clarke in barring the introduction of any evidence and dismissing a complaint to enforce racial restrictions, on December 6, 1945, stated:

> "This Court is of the opinion that it is time members of the Negro race are accorded, without reservation and evasion, the full rights guaranteed them un-

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[13]181 Cal. 680, 186 Pac. 596, 9 A. L. R. 115 (1919).

[14]*Fairchild v. Raines*, 24 Cal. (2d) 818, 151 Pac. (2d) 260 (1944).

der the Fourteenth Amendment to the Federal Constitution. Judges have been avoiding the real issue for too long. Certainly there is no discrimination against the Negro race when it came to calling upon its members to die on the battlefields in defense of this country in the War just ended. The objections of the defendant to the introduction of testimony will be sustained. I think that disposes of the matter at this particular time."[15]

Los Angeles Superior Court Judge Stanley Mosk, in a more recent case, in dismissing a complaint, delivered the following remarks from the bench on the 23rd day of October, 1947:

"There is no allegation and no suggestion that any of these defendants would not be law-abiding neighbors and citizens of the community. The only objection to them is their color and race.

"We read columns in the press each day about un-American activities. This Court feels there is no more reprehensible un-American activity than to attempt to deprive persons of their own homes on a 'Master Race' theory.

"Our nation just fought against the Nazi race superiority theory. One of these defendants was in that war and is a Purple Heart Veteran.

"This Court would indeed be callous to his constitutional rights, if if were now to permit him to be ousted from his own home by using 'race' as the measure of his worth as a citizen and neighbor.

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[15] *Anderson v. Auseth*, Los Angeles Superior Ct. No. 484808. Now on appeal taken by plaintiffs, see Note 3, *supra*.

"The alleged cause of action here is thus inconsistent with the guarantees of the Fourteenth Amendment to the Constitution. The Demurer is sustained without leave to amend."[16]

Judge Albert F. Ross, of the Superior Court of Orange County, rendered a judgment on the 18th day of September, 1943, in which he stated:

"It is hereby ordered, adjudged and decreed, that plaintiffs Ashley V. Doss and Anna Z. Doss, husband and wife, Oliver E. Schrunk and Virgina Schrunk, husband and wife, Charles R. Hobson and Marjorie M. Hobson, husband and wife, take nothing by their complaint; that the provisions of plaintiffs' deed providing 'That no portion of the said property shall at any time be used, leased, owned or occupied by any Mexicans or persons other than of the Caucasian race,' as respecting and concerning defendants Alex P. Bernal, a citizen of the United States and Esther Bernal a citizen and National of the Republic of Mexico is null and void as in violation of public policy in that said restriction has a tendency to be and is injurious to the public good and society; violative of the fundamental form and concepts of democratic principles, procedure and Government and inimical to the social and political policy of the Government of the State of California and the United States of America."[17]

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[16]*Wright v. Drye*, Los Angeles Superior Ct. No. 535126.

[17]*Doss v. Bernal*, Orange County Superior Ct. No. 41466.

Conclusion.

The rights involved here are basic to the free existence of millions of Americans. As we have shown, this discrimination prompted by commercial and monetary considerations, is growing with the speed and malignancy of a cancer. This growth has produced and is producing severe social strains and pressures. No remedies for these are apparent. The evil accomplished by a few pieces of paper in a day cannot be eradicated for many years or even generations.

We have come a long way in social awareness since the days of the *Civil Rights Cases*[18] and the decisions of this court have kept pace. These restrictive covenants are more than "mere discriminations"[19] or private wrongs which were held in the *Civil Rights Cases* to be beyond the purview of Federal legislative and judicial action. This problem cannot be ignored by the courts with the pious hope that it will be solved through the years by the gradual education and enlightenment of the people and the gradual development of tolerance and advanced social thinking. Strong, courageous and decisive judicial action invalidating private race restrictions is the only answer.

Your *amici curiae* most vigorously urge their support of the petitioners' position in this case, which are premised upon the same grounds urged in the cases, including

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[18]109 U. S. 3, 1883.

[19]109 U. S. at 25.

that of their client, pending before the Supreme Court of the State of California, to the effect that private contracts and covenants which attempt to bar the use and occupancy of real property to persons proscribed on account of race or religion, are in violation of the Fourteenth Amendment to the Constitution of the United States and are void and that this Court should so hold in the case at bar.

Respectfully submitted,

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